ANG LIT YIANG & ORS.

v.

TEOH HING YEU & ORS.

COURT OF APPEAL, KUALA LUMPUR
TAN SRI DATO' LAMIN MOHD. YUNUS PCA
DATO' ABU MANSOR ALI JCA
DATO' ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: P-04-105-95]
5 OCTOBER 1996

CIVIL PROCEDURE: *Damages - Fatal accident - Dependency claim - Loss of support - Multiplier and multiplicand - Whether appellate Court could reduce years of purchase when no appeal made in respect thereof - Civil Law Act 1956 ss. 7(3)(iv) & 7(3)(iv)(d).*

This appeal emanated from two separate claims for loss of support by the respective dependants of a motorcycle rider and his pillion, both since deceased. Before the learned appeal Judges herein, the appellants alleged that the multiplicand and the multiplier as adopted by the Court below were erroneous. In particular it was said that the learned Judicial Commissioner was wrong when he, disturbing the multiplier of 16 years used by the learned Sessions Judge, reduced the years of purchase thereof to 8 in the case of the motorcylist and to 10 in the case of the pillion rider. It was not in dispute that, in the appeal before the Judicial Commissioner, the respondents, who were then the appellants, did not appeal on the question of multipliers and therefore did not plead in their Memorandum of Appeal whether the learned Sessions Judge was wrong in taking the figure16 as the multiplier applicable. The issue was whether in the circumstances the Judicial Commissioner erred in reducing the years of purchase the way he did.

Held:

Per: Lamin Mohd Yunus PCA (delivering the judgment of the Court):

[1] On the facts, the learned Judicial Commissioner had not erred in his finding on the question of the multiplicand.

[2] Since there was no appeal on the issue of multipliers, and no plea made in the Memorandum of Appeal whether the learned Sessions Judge was wrong in law and in fact in taking the figure16 as a multiplier for both cases, it was most improper for the appellate Judge on his own motion to disturb the finding of the Court below on that point, being a point not appealed against.

[Appeal allowed. Decision of Sessions Judge restored]

[Bahasa Malaysia Translation of Headnotes]

PROSEDUR SIVIL: *Gantirugi - Kemalangan maut - Tuntutan tanggungan - Kehilangan penyara - Pengganda dan angka gandaan (multiplicand) - Samada Mahkamah rayuan dapat mengurangkan tahun-tahun pembelian walaupun tiada rayuan dibuat mengenainya - Akta Undang-Undang Sivil 1956 ss. 7(3)(iv) & 7(3)(iv)(d).*

Rayuan ini berpunca daripada dua tuntutan yang berasingan bagi kehilangan penyara oleh tanggungan-tanggungan kepada seorang penunggang motosikal dan pemboncengnya, kedua-duanya sejak itu telah pun meninggal dunia. Di hadapan Hakim rayuan yang bijaksana di sini, perayu-perayu mendakwa bahawa angka gandaan dan penggandanya seperti yang diterima pakai oleh Mahkamah di bawah adalah salah. Khususnya dikatakan bahawa Pesuruhjaya Kehakiman yang bijaksana salah apabila beliau, sewaktu mengganggui pengganda 16 tahun yang digunakan oleh Hakim Mahkamah Sesyen yang bijaksana, telah mengurangkan tahun-tahun pembeliannya kepada 8 dalam kes penunggang motosikal dan kepada 10 dalam kes pembonceng. Tidak dipertikaikan bahawa dalam rayuan di hadapan Pesuruhjaya Kehakiman, responden, yang merupakan perayu ketika itu, tidak merayui atas persoalan pengganda dan dengan itu tidak memplid dalam Memorandum Rayuan mereka samada Hakim Mahkamah Sesyen salah dalam mengambil angka 16 sebagai pengganda yang terpakai. Isu yang timbul adalah samada, dalam halkeadaan yang wujud, Pesuruhjaya Kehakiman telah tersalah dalam mengurangkan tahun-tahun belian sepertimana yang dilakukannya.

Diputuskan:

Oleh Lamin Mohd. Yunus PMR (menyampaikan penghakiman Mahkamah):

[1] Berdasarkan fakta-fakta, Pesuruhjaya Kehakiman yang bijaksana tidak tersalah dalam keputusannya mengenai persoalan angka gandaan.

[2] Oleh kerana tidak terdapat rayuan mengenai isu pengganda, dan tiada rayuan dibuat dalam Memorandum Rayuan samada Hakim Mahkamah Sesyen yang bijaksana salah di sisi undang-undang dan fakta dalam mengambil angka 16 sebagai pengganda bagi kedua-dua kes, ianya sungguh tidak wajar bagi Hakim rayuan atas usulnya sendiri untuk mengganggui keputusan Mahkamah di bawah atas perkara itu, ianya merupakan perkara yang tidak dirayui.

[Rayuan dibenarkan. Keputusan Hakim Mahkamah Sesyen dikekalkan]

Cases referred to:
Chan Chin Min & Anor. v. Lim Yok Eng [1994] 3 CLJ 687 ***(cit)***

Legislation referred to:
Civil Law Act 1956, ss. 7(3)(iv), 7(3)(iv)(d)

For the appellant - Baldev Singh Bhar (D.R. Rajah with him); M/s. Syarikat Baldev Bhar
For the respondent - Gerard Chan (Tang Khye Kian with him); M/s. Tang Khye Kian & Co.

JUDGMENT

Lamin Mohd. Yunus PCA:

This is an appeal against the decision of the learned Judicial Commissioner of the High Court Pulau Pinang made on 20 April 1995. His decision was in two civil appeals namely Pulau Pinang High Court Civil Appeals Nos. 12-3-94 and 12-4-94. The two appeals were against the decision of the Sessions Court Judge Butterworth in two civil actions, one filed on 2 June 1992 by the mother of the rider (deceased) of a motorcycle PBU 6429 against the driver of a motorcar PAN 639 (Butterworth Sessions Court Civil Suit 53-141-1992), the other on 8 May 1992 by the parents of the pillion rider (deceased) against the driver and owner of the said car (Butterworth Sessions Court Civil Suit 53-117-1992). Both were consolidated on 8 April 1993. The two vehicles were involved in an accident that took place in the early hours of 9 April 1992. At the time of their untimely death, the rider of the motorcycle and the pillion were 20 and 16 years old respectively. (The learned Judicial Commissioner, in his judgment, refers to their ages as being 21 and 15 respectively. The statement of claims in respect of the rider of the motorcycle carries the figure 20 while that of the pillion carries the figure 16.)

The central point in the appeals before us was on the question of the loss of support that was awarded to the mother of the deceased motorcyclist and the parents of the deceased pillion under s. 7(3)(iv)(d) of the Civil Law Act 1956 (Act 67 - Revised 1972) as amended. With regard to this item submissions were made on the multiplicand and the multiplier in both cases. Learned Counsel for the respondent, in sum, urged us to confirm in particular the multipliers as decided by the learned Judicial Commissioner in the light of the majority decision in *Chan Chin Min & Anor. v. Lim Yok Eng* [1994] 3 CLJ 687.

Before we proceed to comment on the multipliers, we propose to first dispose of the matter of the multiplicands about which we are not at variance with the finding of the learned Judicial Commissioner who had this to say (p. 11 of his judgment):

a On the evidence before the trial Court - the motor-cyclist was earning between RM1,000 to RM1,100 per month, giving RM400 a month, RM700 when his income improved and he was giving RM700 a month to his mother just before he died, was having his meals at his mother's house, and his food cost RM10 to RM20 per day, and the household spent RM30 a day on food - the trial Court's assessment of RM450 per mensem as the loss of support was not unreasonable. Similarly, on the evidence that the pillion rider (i) was working in a foundry (ii) earning RM800 a month (iii) giving RM500 a month to his parents (claimants) for the benefit of his elder brother (according to the father (SP3)) and for the benefit of the family (according to the mother (SP9)) (iv) the RM500 was spent by the father, the trial Court's assessment of RM200 per mensem as the loss of support was not unwarranted, and the difference between this Court and the trial Court's assessment, so too in the case of the motor-cyclist, was negligible and did not warrant any interference.

With regard to the multipliers, learned Counsel for the appellants submitted that it was wrong for the Judicial Commissioner on his own motion to reduce the years of purchase from 16 to 8 in the case of the motorcyclist and from 16 to 10 in the case of the pillion rider. (There is some confusion here. In the order of the High Court dated 20 April 1995, it is stated that the multiplier is reduced from 16 to 8 in both cases. In the written judgment of the learned Judicial Commissioner on the other hand, there appears the figure '10' in both cases instead of the figure '8'. However there was a reduction.) Paragraph 2 of their memorandum of appeal reads:

> 2. The learned appellate Judicial Commissioner erred in law and in fact in reducing the years of purchase in both cases as there was no appeal by the appellants' Counsel in his memorandum of appeal to reduce the years of purchase which is set out clearly in the Civil Law Act 1956 s. 7(3)(iv) and s. 7(3)(iv)(d) and further there was no application to amend the memorandum of appeal at the hearing of the appeal.

For the purpose of the appeal before the High Court the respondents who were then the appellants did not appeal on the question of multipliers and therefore did not plead in their Memorandum of Appeal whether the learned Sessions Court Judge was wrong in law and in fact in taking the figure 16 to serve as a multiplier for both cases. They also did not apply to amend their Memorandum of Appeal at the hearing of the appeal. We think so too that it was most improper for an appellate Judge on his own motion to disturb the finding of the Court below on a point that was not being appealed on. An appellate Judge should be slow to do so unless it has caused a failure of justice. For the reason we stated above and for that reason only we restored the decision of the Sessions Court Judge.

Reported by W.A. Sharif